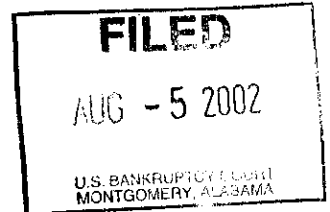


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA



In re

Case No. 02-30474-DHW

Chapter 13

MARY C. SANDERS,

Debtor.

OPINION ON OBJECTION TO CONFIRMATION

The chapter 13 trustee filed an objection to confirmation of the debtor's proposed chapter 13 plan. The trustee contends that the plan does not satisfy the "best interests test" set forth in 11 U.S.C. § 1325(a)(4) because the plan does not propose to pay unsecured creditors the value of unimproved real property in which the debtor has an interest.

The objection came on for final hearing on June 10, 2002. The parties submitted the objection to the court for decision based on a joint stipulation of facts.

Facts

The debtor filed a petition under chapter 13 of the Bankruptcy Code on February 12, 2002. The schedules filed by the debtor did not reflect any ownership of real property. The debtor filed a plan proposing to pay allowed unsecured claims from a "pot" of \$1,000.00. The pot will pay approximately 32% of unsecured claims.

Prior to her divorce in 1993, the debtor owned unimproved real property jointly with her husband. Paragraph 3(d) of the settlement agreement incorporated by the judgment of divorce awarded the property to her husband:

The Husband shall also have the sole and exclusive possession and ownership of, and title to, the real estate

located at 1556 Chapel Road, Wetumpka, Alabama. The Husband shall be solely responsible for all obligations of maintenance, tax, and insurance on said real estate, and he will be solely responsible for payment of any indebtedness owed o [sic] on said real estate.

Paragraph 3(d) further contained the following provision:

Simultaneously with the execution of this Agreement, each party agrees to execute the necessary deed transferring to the other all of their individual right, title or interest in or to said lots and houses.

The debtor never executed a deed conveying her interest in the property. She currently resides on the property in her mobile home. The Elmore County Revenue Commissioner values the property at \$22,050.00.

Contentions of the Parties

The parties dispute the effect of the settlement agreement on the debtor's interest in the property. The debtor contends that the settlement agreement divested her of any interest in the property; the trustee contends that she remains a joint owner of the property and must pay the value of the property to unsecured creditors.

Conclusions of Law

The issue before the court is the effect of the judgment of divorce on the debtor's interest in the real property. The intent and purpose of the divorce court, evidenced from the proceedings and decree as a whole, must control. *Burnett v. Roy Martin Construction, Inc.*, 847 F. 2d 704, 706 (11th Cir. 1988) (citing *Martin v. Magnolia Terrace*, 366 So. 2d 275 (Ala. 1979)).

The first provision of the settlement agreement unequivocally awards the possession, ownership, and title to the real property to the

husband, commensurate with the appurtenant responsibilities of maintenance, insurance, and taxes, as well as any outstanding indebtedness. The second provision, however, requires the execution of the "necessary deed" to effect the transfer. Although the debtor never executed a deed to the property, the husband never enforced the order by obtaining a deed from the court.¹

In *Lawley v. Smith*, 409 So. 2d 809 (Ala. 1982), the Alabama Supreme Court examined an order requiring the transfer of property left undivided by the judgment of divorce. The order required the husband to pay his former wife \$30,000 for her interest in property they held jointly with right of survivorship. The order authorized the husband to obtain a deed from the court register in the event the wife failed to issue the "necessary deed" after the husband tendered the money. The husband did not tender the \$30,000, and the wife died within one year of entry of the order.

A dispute arose between the former husband and the executrix of the wife's estate. The trial court held that the order requiring the sale did not affect the title to the property. The court reasoned that payment of the

¹ Rule 70 of the Alabama Rules of Civil Procedure states as follows:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

\$30,000 was a condition precedent to the passing of title. Because the money had not been paid, the trial court concluded that title to the property “remained as provided for in the original deeds to the property.” The Alabama Supreme Court reversed.

The Alabama Supreme Court held that the order had the effect of destroying the survivorship feature of the joint tenancy and rendering the parties tenants in common. The court stated as follows:

Either was entitled to have the order enforced and, upon the death of the wife, her personal representative was entitled to have the order enforced. . . . The trial court mistakenly characterized the payment of the purchase price as a condition precedent which did not occur. The court ordered the husband to pay that amount as consideration for the wife’s interest in the property. Had the exact provision been incorporated in a contract for the sale of the land, either party would have been entitled to specific performance of the contract, the husband upon tendering the purchase price and the wife upon tendering a deed.

The court concluded that, upon the death of the wife, her heirs became tenants in common with the former husband, subject to the former husband’s right to enforce the order by paying the \$30,000 purchase price.

In the instant case, the record does not reflect whether the debtor and her former husband owned the property as tenants in common or jointly with the right of survivorship. However, the settlement agreement as incorporated by the judgment of divorce would have destroyed the survivorship feature of any joint tenancy.²

The court concludes that the debtor holds title to her one-half

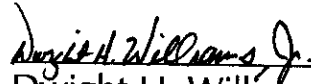
² See *Lawley*, 409 So. 2d 809.

interest in the real property subject to the former husband's right to enforce the judgment of divorce by requesting the "necessary deed" from the court.

The court further concludes that the debtor's interest in the property has no market value which a chapter 7 trustee could liquidate for the benefit of unsecured creditors because the former husband can defeat the debtor's interest at any time by enforcing the judgment of divorce.³ The court, therefore, concludes that the debtor's plan as proposed satisfies the "best interests test" of 11 U.S.C. § 1325(a)(4).

A separate order will enter overruling the trustee's objection to confirmation of the debtor's proposed chapter 13 plan.⁴

Done this 12th day of July, 2002.


Dwight H. Williams, Jr.
United States Bankruptcy Judge

c: Debtor
Earl Gillian, Jr., Attorney for Debtor
Curtis C. Reding, Trustee

³ The stipulated facts reveal that the property is of some value to the wife because she currently resides on the property in her mobile home. However, the trustee has not alleged that the former husband and wife have engaged in any conspiracy or collusion to defraud the creditors of the wife, and there is no evidence of such in the facts before the court.

⁴ However, this order does not absolve the debtor of the responsibility to amend the schedules to reflect her interest in the real property irrespective of the value of that interest.